CHAU KAM HOON

v.

PP

HIGH COURT MALAYA, KUALA LUMPUR
AUGUSTINE PAUL J
[CRIMINAL APPEAL NO: 42-23-2003]
30 JULY 2003

CRIMINAL LAW: *Penal Code - Section 474 - Having possession of forged credit card with intent to use as genuine - Appeal against conviction and sentence - Whether evidence of expert witness did not comply with s. 159 Evidence Act 1950 - Whether defence deprived of statutory right of cross-examination on evidence - Whether charge against accused proven*

EVIDENCE: *Expert witness - Admissibility - Expert witness referred to document to refresh memory while giving evidence - Whether requirements of s. 159 Evidence Act satisfied - Whether expert witness refreshed memory in respect of whole of evidence - Whether evidence vitiated*

EVIDENCE: *Witness - Expert witness - Defence precluded from cross-examination of expert witness on document used to refresh memory - Whether defence deprived of statutory right of cross-examination - Whether evidence of expert evidence admissible - Whether charge against accused proven*

The accused was charged for an offence under s. 474 of the Penal Code for being in possession of a Visa credit card, which he knew to be forged, with intent to use it as genuine. He was convicted and sentenced to imprisonment for a term of one year and eight months. The accused appealed against the conviction and sentence, submitting that the evidence of one PW3, an expert in establishing the element of forgery, should not be accepted as he had been allowed to refresh his memory while giving evidence – by referring to his record book – without complying with s. 159 of the Evidence Act 1950 ('the Act'). The accused further averred that the defence was not allowed to view the document referred to by PW3.

Held:

[1] On the facts, this court was unable to say whether the record book used by PW3 to refresh his memory accorded with the requirements of s. 159 of the Act, and in any event, there was nothing on record to show that there was a need for PW3 to refresh his memory. It would appear that he referred to the document as of right and the sessions court judge granted leave to do so automatically without being aware of what was happening, and with the prosecution not ensuring that the document referred to by PW3 had satisfied the requirements of law. The note made by the sessions court judge at the end of the examination-in-chief conveyed the impression that PW3 refreshed his memory in respect of his whole evidence. In the circumstances, this court was compelled to conclude that the whole of the evidence of PW3 had been vitiated. (pp 371 g-h & 372 a)

[2] On the facts, it was clearly irregular that the defence was precluded from cross-examining PW3 on the entries in the record book on the ground that the court had given leave to the witness to refer to it. Thus, the defence had been denied the opportunity to verify the document used by PW3 to refresh his memory. It was a miscarriage of justice as the defence had been deprived of its statutory right of cross-examination on the evidence; the evidence of PW3 was therefore not admissible. Hence, in the final analysis, PW3's evidence could not be taken into consideration with the result that the charge against the accused could not be said to have been proven. (p 373 d-f)

[Appeal allowed; conviction and sentence of accused quashed.]

Case(s) referred to:

Baliram Tikaram v. Emperor AIR (32) [1945] Nag 1 ***(refd)***
Bolton v. Tomlin 5 A & E 836 ***(refd)***
Emperor v. Mahadeo Dewoo AIR [1946] Bom 189 ***(refd)***
Gregory v. Tavernor [1833] 6 C & P 280 ***(refd)***
Henry v. Lee 2 Chitty 124 ***(refd)***
Jewan Lal v. Nilmoni AIR [1928] PC 80 ***(refd)***
Moomin Seman v. PP [1993] 4 CLJ 61 HC ***(refd)***
Nemi Chand v. Wallace 10 CWN 107 ***(refd)***
Pannalal Shaw v. Nanigopal Biswas AIR (36) [1949] Cal 103 ***(refd)***
PP v. Paneerselvan [1991] 1 MLJ 195 ***(refd)***
R v. Da Silva [1990] 1 All ER 29 ***(refd)***
R v. Duncombe [1838] 8 C & P 369 ***(refd)***
Re The Detention of Leonard Teoh Hooi Leong [1998] 1 CLJ 857 HC ***(refd)***

Republic of Indra v. GP Rajan AIR [1967] Or 115 ***(foll)***
Sabitri Thakurain v. FA Svi AIR [1933] 306 ***(refd)***
Senat v. Senat [1965] P 172 ***(refd)***
The Empress v. Jhubboo Mahton 8 Cal 739 ***(refd)***
The Queen v. TM Appuhamy [1959] 60 NLR 313 ***(refd)***
Yuen Chun Yii v. PP [1997] 3 SLR 57 ***(refd)***

Legislation referred to:
Evidence Act 1950, ss. 159(1), (2), 161
Penal Code, s. 474

Other source(s) referred to:
ERSR Coomaraswamy, *The Law of Evidence,* Vol II Book 2, p 822
Sarkar on Evidence, 15th edn, vol 2, pp 2295, 2298

For the appellant - How Boon Seng; M/s The Chambers Of Seng
For the respondent - Ahmad Bache DPP

Reported by Suresh Nathan

JUDGMENT

Augustine Paul J:
In this case the accused was charged in the Sessions Court at Kuala Lumpur for an offence under s. 474 of the Penal Code for being in possession of a Visa Credit Card knowing it to be forged with intent to use it as genuine. He claimed trial to the charge. At the conclusion of the trial he was found guilty and convicted. He was sentenced to imprisonment for a term of one year and eight months. This appeal is by the accused against the conviction and sentence.

The evidence in the Sessions Court reveals that PW1 was a cashier attached to the Jaya Jusco at Mid Valley. On 3 November 2001, the accused came to her counter to make payments for purchases made by him through a Visa card (exh. P1). As she said:

> Apabila saya terima kad itu daripada tertuduh saya periksa kad itu dan didapati hologram burung itu bila pusing, tidak bergerak dan saya dapati juga label Visa di bawah hologram itu tidak ada angka. Saya swipe untuk dapat pengesahan daripada bank. Bila saya swipe ada approval code.

She said her examination of the card showed that it was false. She then telephoned the credit card company and her examination was confirmed. PW1 then reported the matter to her security division. The accused was arrested. The learned Deputy Public Prosecutor conceded that the evidence of PW1 is insufficient on its own to establish that exh. P1 is a forged card presumably

on the ground that it is a fact that must be established by expert opinion evidence. The prosecution therefore relied on the evidence of PW3, an expert in this field, to establish this element. He gave evidence to show that exh. P3 is a forged card. While giving evidence he had referred to his record book as evidenced by the following entry made by the learned Sessions Court Judge at the end of his examination-in-chief:

> Saksi dibenarkan merujuk kepada buku catitannya.

His cross-examination was rather short. It runs as follows:

> Selepas dipanggil oleh Sjn Jamari, saya pergi ke IPK. Siasatan dijalankan di IPK. Saya tidak bawa balik kad. Saya buat catatan untuk menolong saya. Saya tidak membawa catatan itu hari ini. Saya ada buat catitan harian mengenai kes ini. Ini adalah buku saya simpan untuk mencatit semua siasatan dijalankan.
>
> P/bela: Sila beritahu Mahkamah apa yang ada dicatit dalam buku catatan itu.
>
> Saksi: Telah membaca catitan itu.
>
> Catitan dalam buku ini adalah catitan saya sendiri. Saya gunakan catitan ini untuk Mahkamah hari ini.
>
> Mahkamah: Soalan-soalan mengenai catitan tidak relevan atas alasan bahawa saksi dibenar merujuk kepada catitannya.

The thrust of the submission of the defence was that the evidence of PW3 should not be accepted as he had been allowed to refresh his memory while giving evidence without complying with s. 159 of the Evidence Act 1950 ("s. 159") and that the defence was not allowed to view the document referred to by PW3. The learned Deputy Public Prosecutor said that even if the cross-examination of PW3 was found to be defective his examination-in-chief must be accepted. The submission advanced raises two matters for consideration. They are:

(a) The circumstances in which a witness may refresh his memory by referring to a document.

(b) The right of the defence to view the document.

I shall now consider both the issues.

(a) The Circumstances In Which A Witness May Refresh His Memory By Referring To A Document

This is governed by s. 159 which reads as follows:

> (1) A witness may while under examination refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the court considers it likely that the transaction was at that time fresh in his memory.
>
> (2) The witness may also refer to any such writing made by any other person and read by the witness within the time aforesaid, if, when he read it, he knew it to be correct.
>
> (3) Whenever the witness may refresh his memory by reference to any document, he may, with the permission of the court, refer to a copy of that document:
>
> Provided the court is satisfied that there is sufficient reason for the non-production of the original.
>
> (4) An expert may refresh his memory by reference to professional treatises.

Generally a witness gives evidence on facts from his recollection. It sometimes happens that he is unable to remember them. He is then allowed to refer to documents containing an account of the facts. This is known as refreshing memory. As ERSR Coomaraswamy says in his book entitled *The Law of Evidence,* vol II Book 2 at p. 822:

> By 'refreshing memory' is meant that he looks at the document and then gives his evidence. He cannot read the document aloud as his evidence.

In order to ensure that the document referred to is reliable s. 159 provides that the writing must have been made by the witness himself contemporaneously with the transaction to which he testifies or so soon afterwards that the facts were fresh in his memory or if the writing is made by someone else it must have been read by the witness within the aforesaid time and known by him to be correct. In commenting on the time of preparation of the document *Sarkar on Evidence,* 15th edn, vol 2 says at p. 2298:

> It is plain that no precise time limit is possible. The law does not require that the writing must have been made the moment the transaction took place. If it is not possible to make it contemporaneously with the transaction, it must be made so soon afterwards that it may be reasonably inferred that the facts were fresh in the mind. Whether the interval between the two, is such as to justify the presumption that memory became impaired, is a matter depending on the circumstances of each case and the retentive faculty of each witness.

> The section gives the court a discretion and if it considers it probable that the facts were fresh in the witness's mind when the writing was made, it will decide in favour of the document. In the case of a document written by another, it must be read and its accuracy recognised by the witness within the aforesaid time.

In dealing with the determination of contemporaneity Stuart-Smith J said in *R v. Da Silva* [1990] 1 All ER 29 at p. 32:

> Counsel for the appellant has drawn our attention to *R v. Graham* [1973] Crim LR 628, in which the court said that a judge should hesitate before deciding that a statement made 27 days after the event was contemporaneous. But the court was not there saying that a statement made after that length of time could not be contemporaneous. It is a question of fact and degree in each case, and the matter should be investigated to see that the events were fresh in the witness's mind after the lapse of time. Much will depend on the nature of the evidence to be given. Where, for example, a witness purports to give a verbatim account of a conversation, the note will need to have been made much nearer the time than if he merely purports to give the general effect of a conversation.

The document is not evidence but the recollection is. As Ellenborough LCJ said in *Henry v. Lee* 2 Chitty 124:

> It is not the memorandum that is the evidence, but the recollection of the witness.

The words "any writing" in s. 159 is a reference to every kind of writing. As *Sarkar on Evidence,* 15th edn, vol 2 says at p. 2295:

> It is immaterial therefore, what the document is, whether, it be a book of account, letter, bill of particulars of articles furnished, including such items as dates, weights, and prices, way-bills, notes made by the witness, or any other document whatsoever which is effectual to assist the memory of the witness.

It is therefore not necessary that a document should be legally admissible before it may be used to refresh memory (see *Emperor v. Mahadeo Dewoo* AIR [1946] Bom 189; *Bolton v. Tomlin* 5 A & E 836). It follows that the document need not have been admitted in evidence before being used (see *Jewan Lai v. Nilmoni* AIR [1928] PC 80).

A witness cannot refresh his memory as of right and must therefore get the leave of court to do so (see *PP v. Paneerselvan* [1991] 1 MLJ 195; *Re The Detention of Leonard Teoh Hooi Leong* [1998] 1 CLJ 857; *Moomin bin Seman v. PP* [1993] 4 CLJ 61). There must be a need for the witness to refer to a document and it would not be proper to grant leave to refer to such a document simply because a request was made by a party (see *Yuen Chun Yii v. PP* [1997] 3 SLR 57). The facts which entitle a witness to refresh his memory ought to be first elicited from him, that is to say, that he had no clear independent recollection but wanted to refresh his memory by seeing the writing (see *Sabitri Thakurain v. FA Svi* AIR [1933] 306). Where s. 159(1) applies it must then be shown that the writing was made by the witness himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the court considers it likely that the transaction was at that time fresh in his memory. Where s. 159(2) applies it must be shown that the writing was made in his presence at about the time the incident took place and that he had read that writing at that time and found the contents to be true. It is the responsibility of the prosecution and the court to ensure that the proper document is used to refresh memory. Where a document used to refresh the memory of a witness does not comply with the requirements of s. 159 his evidence will be vitiated (see *Pannalal Shaw v. Nanigopal Biswas* AIR (36) [1949] Cal 103). If a document is being used to refresh the memory of a witness, who recorded it, the fact should be made clear so that the adverse party may exercise the right conferred on him by s. 161 of the Evidence Act 1950 ("s. 161") (see *The Queen v. TM Appuhamy* [1959] 60 NLR 313).

In this case PW3 referred to his record book while giving evidence. This is a book that he keeps for recording his investigations. PW3 had also, however, made some other entry elsewhere to assist him in the investigation. Quite obviously that is the writing that was prepared contemporaneously by PW3 at the time he conducted the investigation. There is no indication as to when the record book used by PW3 was prepared. He did not bring that entry to court. Thus I am unable to say whether the record book used by PW3 to refresh his memory accords with the requirements of s. 159. In any event there is nothing on record to show that there was a need for PW3 to refresh his memory. It would appear that he referred to the document as of right and the learned Sessions Court Judge granted leave to do so automatically without being aware of what was happening and with the prosecution not ensuring that the document referred to by PW3 has satisfied the requirements of law. I must add that the notes of evidence do not indicate whether it was only a part of the evidence of PW3 that was given after his memory was refreshed. On the contrary the note made by the learned Sessions Court Judge at the end of the examination-

in-chief may convey the impression that PW3 refreshed his memory in respect of the whole of his evidence. In the circumstances I am compelled to conclude that the whole of the evidence of PW3 has been vitiated.

(b) The Right Of The Defence To View The Document

The matter is further compounded by the refusal of the learned Sessions Court Judge to allow the defence to cross-examine PW3 on the record book he had used to refresh his memory simply because he had been granted leave to do so. This overlooks s. 161 which reads as follows:

> Any writing referred to under section 159 or 160 must be produced and shown to the adverse party if he requires it; such party may, if he pleases, cross-examine the witness thereupon.

This section entitles the opposing party to a right of inspection and cross-examination on the document used by the witness to refresh his memory.

The Right Of Inspection

Where the document produces no impression on the memory of the witness the opposite party is not entitled to inspect it (see *R v. Duncombe* [1838] 8 C & P 369; *Nemi Chand v. Wallace* 10 CWN 107). This is simply because the document would not have served its purpose. Field J said in *The Empress v. Jhubboo Mahton* 8 Cal 739 that the grounds upon which the opposite party is permitted to inspect a writing used to refresh the memory of a witness are threefold:

(i) to secure the full benefit of the witness' recollection as to the whole of the facts;

(ii) to check the use of improper documents; and

(iii) to compare his oral testimony with his written statement.

His Lordship suggested that the right must be exercised at the time the document is referred to; failing which it is lost. This view, to my mind, is too rigid as the opposing party may be in a better position to appreciate the contents of the document at the end of the examination-in-chief. Thus I would agree with *Republic of Indra v. GP Rajan* AIR [1967] Or 115 where it was held that it is always usual and very reasonable, when a witness speaks from memoranda, that the counsel should have an opportunity of looking at those memoranda when he is cross-examining the witness. This, of course, does not mean that the right cannot be exercised at an earlier point of time. Needless to say, if

the right is not exercised then it must be considered as having been waived. That, of course, does not mean that any irregularities in the use of a document to refresh memory under s. 159 are correspondingly waived.

The Right Of Cross-Examination

Quite clearly the principal object of this right is to give the opposing party a further opportunity to ensure that the document used to refresh memory is in compliance with the requirements of s. 159. Cross-examination on the portion referred to by the witness does not make the document evidence against the cross-examiner (see *Gregory v. Tavernor* [1833] 6 C & P 280). But if there is cross-examination on parts of the document not used by the witness to refresh his memory, the party calling the witness is entitled to require the cross-examiner to make the document evidence (see *Senat v. Senat* [1965] P 172).

In this case the question of a denial of the right to inspect the document does not arise as no application was made to that effect. But the defence was precluded from cross-examining PW3 on the entries in the record book on the ground that the court has given leave to the witness to refer to it. This is clearly irregular. The defence has been denied the opportunity to verify the document used by PW3 to refresh his memory. It is a miscarriage of justice as the defence has been deprived of its statutory right. Evidence is not admissible when a party has been deprived of his statutory right of cross-examination on it (see *Baliram Tikaram v. Emperor* AIR (32) 1945 Nag 1). The evidence of PW3 is therefore not admissible.

In the final analysis the evidence of PW3 cannot be taken into consideration with the result that the charge against the accused cannot be said to have been proved. In the circumstances I allowed the appeal and quashed the conviction and sentence against the accused.